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Supreme Court of the United States

OCTOBER TERM, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR
Petitioner

versus

C. W. VOLLMER & CO., INC.
Respondent

On Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM BY RESPONDENT ON WHETHER CASE HAS BECOME MOOT

May It Please The Court:

In response to the court's order of May 9, 1955, repondent submits this memorandum directed to the question as to whether this case has become moot.

Although the suit was filed while respondent was still engaged in the contract work at issue, the work was completed several months before the trial in the district court.

Under somewhat similar circumstances, this court has held cases to be moot. See *United States vs W. T. Grant Co.*, 345 US 629 (1953); *Commercial Cable Co. vs Burleson*, 250 US 360 (1919).

On the other hand, special considerations point to a contrary conclusion in wage and hour cases generally, and in cases of the type here involved particularly.

Thus, in *Walling vs Helmerich & Payne*, 232 US 37, 43 (1944), a plea that the wage practice in controversy had been terminated before trial, and that the case had accordingly become moot, was denied by this court on the ground that "respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. It is thus 'an actual controversy, and adverse interests' . . . with a 'subject matter on which the judgment of the court can operate' ".

Similarly, respondent continues to urge in the case at bar, that construction activities on "new work" are not within the scope of the Fair Labor Standards Act, and that any effort to bring such work within that scope should be addressed to Congress and not to this court. Respondent has accordingly not urged, at any stage of this proceeding, that the instant case has become moot. *Cf. United States vs W. T. Grant Co., supra*, at 632-33.

Any case under the Fair Labor Standards Act which reaches this court necessarily involves an important question of wide application. As stated in the petition for certiorari herein (pp. 9, 14), to which no opposition was filed, "the question presented is . . . not only of importance to the thousands of employees engaged in similar water-way projects throughout the country, but also to the thousands of employees engaged in interstate highway construction projects".

In each case involving construction contracts let by competitive bidding, as in the case at bar, the main practical significance of the decision is not the determination whether the employer has complied with the Fair Labor Standards Act under the past circumstances actually presented.

The real function of such a decision is to determine the legal question presented for the benefit of the Department of Labor in the overall administration of the Act, and of the employer and others similarly situated for guidance in estimating costs when bidding competitively on other similar contracts.

In view of the relatively short duration of such construction contracts, a holding that completion of the contract renders moot an action by the Secretary of Labor for injunctive relief under the Fair Labor Standards Act, would effectively avoid decision of the substantive issue in practically all such cases.

The relief sought by petitioner in the original proceeding was by injunction to operate, as does all injunctive relief, prospectively. The Secretary of Labor will unquestionably contend, if granted the relief sought, that the decree should operate against future contracts.

Such a decree was actually entered in *Mitchell vs Hughes Construction Company,* Civil Action 3167, Western District of Louisiana, in which the Court of Appeals for the Fifth Circuit had held: "We do not regard this case as moot". 205 F2d 606, 607 *(sub. nom. Tobin vs Ramey),* cert. den., 346 US 925. See also *McComb vs Jacksonville Paper Co.,* 336 US 187, 192 (1949).

Without conceding the validity of such a decree, it is respondent's position, as already pointed out, that it should have a definitive ruling as to the correctness of its interpretation of the Act, for guidance in estimating costs when bidding competitively on future contracts.

It is accordingly respectfully submitted that while, under some of the cited precedents, the instant case may have become moot, the better view is that it has not; and, in any event, the important substantive issue which the case involves should be determined by this court.

EBERHARD P. DEUTSCH
Attorney for Respondent

May 10, 1955

DEUTSCH, KERRIGAN & STILES

ROBERT E. LEAKE, JR.

RENÉ H. HIMEL, JR.
Of Counsel